

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF COMMERCE

In the Matter of the Real Estate
Appraiser License of Janna Aho

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on March 2, 2010. Post-hearing briefs were filed by both parties. The OAH record closed on June 11, 2010, upon receipt of clarification from the Department concerning its post-hearing submissions.

Michael J. Tostengard, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, MN 55101-2130, appeared on behalf of the Minnesota Department of Commerce (Department).

Jack E. Pierce, Attorney at Law, 6040 Earle Brown Drive, Suite 420, Minneapolis, MN 55430, appeared on behalf of Janna Aho (Respondent).

STATEMENT OF ISSUES

1. Did the Respondent violate standards of professional practice, fail to exercise reasonable diligence in developing, preparing, or communicating an appraisal; or engage in negligence or incompetence in developing, preparing, or communicating an appraisal in violation of Minn. Stat. § 82B.20, subd. 2(6) and (7)¹; Minn. R. 2808.6000, subps. 1, 2J, and 3A(1) (2), (3), (4) and (5);² Uniform Standards of Professional Appraisal Practice (USPAP)³ Ethics Rules relating to Conduct, Record Keeping, and Competency; USPAP SR 1-1(a) and (c), 1-4, 1-5(a), 2-2(b)(viii), 2-3; or USPAP Supplemental Standards Rule – Fannie Mae, by failing to report previous appraisals performed within three years on the same property; failing to analyze an agreement for sale; failing to at least drive by comparable sales; failing to maintain work file data; failing to comment on negative factors with respect to property that is the subject of an appraisal; failing to inspect a subject property for an appraisal; failing to research and analyze

¹ Unless otherwise specified, all references to the Minnesota Statutes are to the 2006 version that was in effect during the relevant time period.

² Unless otherwise specified, all references to the Minnesota Rules are to the 2007 version.

³ Unless otherwise specified, all references to the USPAP are to the 2006 version.

active comparables; using data that did not exist as of the appraised date; failing to accurately report rental amounts; accepting information from a party to a transaction without verification; including inaccurate or misleading information in an appraisal; failing to analyze that the sale price of a comparable reflected only the house and not the lot; failing to analyze physical and location differences between the subject property and comparables; selecting and using comparable sales that are not physically or by location the most similar to a subject property; or inaccurately reporting subject property information?

2. If so, is the Respondent properly subject to discipline by the Commissioner?

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. There are four basic levels of licensure for individuals performing appraisals in Minnesota: (1) trainee real property appraiser (must work with a supervisor); (2) licensed real property appraiser; (3) certified residential real property appraiser; and (4) certified general real property appraiser.⁴ Education and experience are needed at each level to advance to the next.⁵

2. The Respondent worked in her father's appraisal business from the time she was a teenager. She registered in 1993, has been licensed as a certified residential real property appraiser since 1997, and currently operates an appraisal business in Brainerd, Minnesota. The Respondent's license has never been disciplined in the past, nor have any other complaints been made to the Department regarding her performance of appraisals.⁶

3. The Respondent grew up in Brainerd and, between 1997 and 2007, performed approximately 90% of her appraisal work in the Brainerd area. Because sales in the Brainerd area are not as plentiful as in the Twin Cities metropolitan area, appraisers who are appraising homes in the Brainerd area often need to expand their search to a wider geographical area to locate properties that are comparable in age, square footage, and location.⁷

4. During the time relevant to this case, the Respondent used the Uniform Residential Appraisal Report form (Freddie Mac Form 70 March 2005) for her appraisals. The Appraiser's Certifications set forth in that form include the following:

⁴ Testimony ("Test.") of Thomas Hack; Minn. Stat. § 82B.11. Minn. Stat. § 82B.11, subd. 6, also permits temporary practice licensure for persons certified or licensed by another state under certain circumstances.

⁵ Minn. Stat. §§ 82B.13 – 82B.14; Test. of Hack.

⁶ Test. of Hack; Test. of Respondent.

⁷ Test. of Respondent.

* * *

2. I performed a complete visual inspection of the interior and exterior areas of the subject property. I reported the condition of the improvements in factual, specific terms. I identified and reported the physical deficiencies that could affect the livability, soundness, or structural integrity of the property.

3. I performed this appraisal in accordance with the requirements of the Uniform Standards of Professional Appraisal Practice that were adopted and promulgated by the Appraisal Standards Board of The Appraisal Foundation and that were in place at the time this appraisal report was prepared.

* * *

7. I selected and used comparable sales that are locationally, physically, and functionally the most similar to the subject property.

* * *

10. I verified, from a disinterested source, all information in this report that was provided by parties who have a financial interest in the sale or financing of the subject property. . . .

5. The performance of real property appraisals is somewhat subjective, but rules, statutes, and guidelines exist to guide appraisers. The three methods generally used are the sales, cost, and income methods. Under the sales approach, the appraiser looks at comparable sales that occurred within a particular period of time. In order to use a property as a comparable sale, the property must in fact have been sold. Properties that have not sold but are active can be used as support for what is occurring in the market if they are reported as “actives.” In selecting comparable sales, it is generally preferable for appraisers to look for properties that are similar in style, square footage, amenities, and location. The closer in time a sale occurred to the date of the appraisal, the better. Under the cost approach, the appraiser takes into account the cost to replace a property (typically used for new construction) or reproduce a property (typically used for older homes). Under the income approach, the appraiser looks at expenses that might be incurred and comparable rentals in the area.⁸

6. The Department commenced an investigation of the Respondent in December of 2007, after one appraisal she had performed was examined as part

⁸ Test. of Hack.

of a separate investigation of a mortgage and real estate fraud complaint. Thomas Hack, Senior Investigator for the Market Assurance Division of the Department, was assigned to investigate the complaint. Mr. Hack is also a licensed appraiser. He examined several of the Respondent's appraisals to determine compliance with applicable statutes, rules, and standards but did not perform review appraisals.⁹

7. Based on its investigation, the Department concluded that the Respondent failed to comply with certain state laws and rules as well as USPAP rules in connection with her appraisals of five residential properties during the time period of October 2006 to May 2007. All five residences were newly constructed and offered for sale by the builder.¹⁰ Each of these properties is discussed below. In each of the appraisals at issue, the Respondent used the comparable sales approach and noted that the income approach was not applicable.¹¹

9161 Atwater Court, Brainerd, Minnesota

8. The Respondent issued a Uniform Residential Appraisal Report as of May 18, 2007, regarding a property located at 9161 Atwater Court, Brainerd, Minnesota. The appraisal was performed for Great American Mortgage and buyer Lin Lee. A trainee employed by the Respondent worked with her on this appraisal, and both the trainee and the Respondent (as Supervisory Appraiser) signed the appraisal on May 19, 2007. The property was described as a split entry, 3-bedroom, 1-bath home situated on a 2.5-acre lot, with an above-grade gross living area (GLA) of 1,483 square feet and a basement and finished below-grade area of 1,483 square feet.¹² In March 2007, two months before the May 2007 appraisal, the Respondent and the same trainee had issued an appraisal of the same property for a different client and borrower.¹³ The prior appraisal was not disclosed in the May 2007 appraisal report.¹⁴ In both instances, the property was appraised at \$260,000.¹⁵

9. The Respondent obtains copies of the purchase agreement in connection with her appraisals whenever possible. Typically the entity ordering an appraisal provides a copy of the purchase agreement at the time it places the order or shortly thereafter. Occasionally, purchase agreements are not provided to the Respondent. In such instances, the Respondent discloses that fact in her appraisal.¹⁶

⁹ Test. of Hack.

¹⁰ Test. of Hack.

¹¹ Test. of Respondent; Exhibits ("Exs"). 1-4, 1-5, 3-4, 3-5, 7-4, 7-6, 19-4, 19-6, 24-4, 24-6, 29-4, 29-6.

¹² Ex. 3; Test. of Hack.

¹³ Ex. 1 (Appraisal as of March 19, 2007); Test. of Hack.

¹⁴ Ex. 3; Test. of Hack.

¹⁵ Exs. 1, 3.

¹⁶ Testimony of Respondent.

10. Respondent's May 2007 appraisal of the Atwater Court property indicates that the Respondent did not analyze the contract for sale for the subject purchase transaction.¹⁷ The Respondent does not specifically remember whether she requested a copy of the purchase agreement.¹⁸

11. The March 2007 appraisal reported that the driveway surface of the Atwater Court property was gravel.¹⁹ In fact, the property only had a dirt driveway at that time.²⁰ The Respondent did not realize that she should draw a distinction between a dirt driveway and a gravel driveway.²¹

12. In conducting the May 2007 appraisal, the Respondent found out that kitchen appliances had been added since the first appraisal was performed but no other changes had been made in the subject property since that time. She did not re-inspect the subject property before issuing the May 2007 appraisal. The Respondent also ascertained that there had been no new sales of split level or multi-level homes in southwest Crow Wing County since the March 2007 appraisal, and therefore relied on the same comparable sales in the May 2007 appraisal as she did in the March 2007 appraisal.²² The May 2007 appraisal discloses that the exteriors of the subject property and of the comparable sales were inspected from the street on March 20, 2007 (apparently in connection with the first appraisal of the property).²³

13. In both the March 2007 and the May 2007 appraisals, the Respondent reported that Comparable Sale No. 4 sold on September 13, 2006, for \$320,000, and noted that the same property had previously sold on December 19, 2005, for \$252,000.²⁴ The Respondent did not include any explanation in the appraisals for the large increase in value during the nine-month interval between the two sales. It would have been appropriate for her to explain this discrepancy.²⁵

14. The Respondent obtained photographs of the comparable sales on the Multiple Listing Service (MLS) and incorporated those pictures in her appraisal report. In her opinion, MLS photographs are most reflective of the condition of those properties when they sold.²⁶

15. The Respondent's work file relating to the March 2007 appraisal included copies of the MLS listings for the properties noted as Comparable Sales

¹⁷ Ex. 3-3. The March 2007 appraisal of the same property indicates that the prior contract for sale was analyzed in connection with that appraisal. Ex. 1-3; Test. of Respondent.

¹⁸ Testimony of Respondent.

¹⁹ Ex. 1-3.

²⁰ Exs. 1-1, 6-1; Test. of Hack.

²¹ Test. of Respondent.

²² Test. of Respondent.

²³ Ex. 3-8.

²⁴ Exs. 1-9, 3-9.

²⁵ Test. of Hack.

²⁶ Test. of Respondent.

Numbers One through Four; six pages of handwritten notes pertaining to the comparables and the layout, materials and features of the subject property; and a copy of the purchase agreement for the subject property.²⁷ The Respondent's work file relating to the May 2007 appraisal was limited in nature and included only a copy of the Request for Appraisal and two pages of handwritten notes pertaining to the subject property.²⁸ There was no market analysis information in either work file showing that research had been conducted regarding the condition of the market and whether it was increasing, decreasing, or stable.

836 Poplar Drive, Kimball, Minnesota

16. The Respondent issued a Uniform Residential Appraisal Report as of November 10, 2006, for a property located at 836 Poplar Drive in Kimball, Minnesota. The appraisal was conducted for Mortgage & Investment Consultants and borrower Maurice Stay. The Respondent signed the report on November 27, 2006. The property was described as a split entry, 2-bedroom, 1-bath home with an above-grade gross living area (GLA) of 928 or 972 square feet and a basement and below-grade area of another 928 or 972 square feet.²⁹ The home was situated on a .24-acre lot and built in 2006. The Respondent concluded that the market value of the property as of November 10, 2006, was \$195,000.³⁰ The appraisal indicates that the Respondent did analyze the contract for sale for the subject purchase transaction.³¹

17. The Respondent had previously received a Request for Appraisal relating to the same property but a different lender and buyer in late October 2006.³² However, requests for appraisals are sometimes cancelled, and there is no convincing evidence that the Respondent actually conducted an appraisal of the property at that time.³³

18. Although the Respondent's appraisal reflected the property's market value as of November 10, 2006, the lender did not fax the formal Request for Appraisal to the Respondent's office until November 16, 2006.³⁴ However, the Respondent had previously received a telephone call from the lender in which she was told that the appraisal was needed, and also exchanged some calls with the lender regarding whether the written request had been received.

²⁷ Ex. 2.

²⁸ Ex. 4; Test. of Respondent.

²⁹ The precise square footage of the property is unclear. The first page of the appraisal (Ex. 7-3) indicated that the GLA and the basement area were each 928 square feet; the second and third pages of the appraisal (Ex. 7-4 and 7-5) stated that the GLA and below-grade areas were each 972 square feet.

³⁰ Ex. 7-1 – 7-16. The Respondent issued the remainder of Ex. 7, consisting of the Appraisal Update, additional photographs, the Operating Income Statement, and the Single Family Comparable Rent Schedule, on February 21, 2007.

³¹ Ex. 7-3.

³² Ex. 8 (Request for Appraisal dated Oct. 23, 2006); Test. of Hack.

³³ Test. of Respondent.

³⁴ Exs. 7, 12; Test. of Hack.

The Respondent did not provide her appraisal to the lender until after she signed it on November 27, 2006, well after the formal Request for Appraisal was received.³⁵

19. The Respondent originally used four comparable sales in connection with her November 2006 appraisal. These sales closed on August 4, 2006, October 5, 2006, October 11, 2006, and September 29, 2006, within approximately one to three months of the November 10 appraisal. Two of the original four comparable properties were located in Kimball, one was in St. Joseph (17 miles north of the subject property), and one was in Sauk Rapids (19 miles north/northeast of the subject property). In February of 2007, after the issuance of the appraisal report, the Respondent added two more comparable sales in Kimball at the request of the client, for additional support. Comparable Sales Numbers 5 and 6 closed on December 12, 2006, and March 24, 2006, respectively.³⁶

20. Comparable Sale Number Two was erroneously identified in the appraisal as a multi-level home.³⁷ However, the MLS listing pertaining to that property indicates that it was, in fact, a split-entry home like the subject property.³⁸

21. The November 2006 appraisal included the following summary of the sales comparison approach:

The distance between the subject and the sales is common in this market, and is not an adverse factor due to the limited number of sales available. Comps 2 & 3 are 17-19 miles away from subject, although were included in this sales analysis due to the lack of sales in the subject's immediate neighborhood/city; these sales reflect the subject's style, quality of construction, age, interior finishing and GLA; site adjustment were [sic] taken for these sales as their site value is determined to be \$10,000 higher in overall value compared to the subject's site due to location, although similar in size. Sales of varying style have been utilized in the sales comparison analysis; a combination of split entry and multi level sales were used, as these sales are the best available to reflect the subject's GLA, room count and amenities.³⁹

After Comparables Numbers 5 and 6 were added in February 2007, the appraisal was revised to include the following comment:

³⁵ Test. of Respondent.

³⁶ Ex. 7-4 – 7-5; Test. of Respondent.

³⁷ Ex. 7-4.

³⁸ Ex. 9-7.

³⁹ Ex. 7-4.

Sales #5 & #6 [both in Kimball] are supplied to support market value expressed on original appraisal report. Adjustments for quality of construction are taken for sales #1 & #6 [also in Kimball] as these sales are determined to be inferior to the subject's many upgrades such as flooring, cabinetry, stone accent siding, and insulated, drywalled and heated garage. Sale #4 [in Kimball] was included in the sales analysis, although GLA is larger than the subject, it reflects the subject's two bedrooms, two car garage and is located on the same street as the subject.⁴⁰

22. There were some differences between the subject property and the comparable sales selected by the Respondent. For example, two of the comparables (Comparable Sales Numbers Two and Three) were located in St. Joseph and Sauk Rapids rather than Kimball; two comparables (Comparable Sales Numbers Four and Six) were one-story homes and not split entries like the subject property and the other comparables; and one of the comparables (Comparable Sale Number Four) was significantly larger than the subject property.⁴¹

23. The Respondent used 888 Poplar Drive S.E. in Kimball as Comparable Sale Number Four in the appraisal because it sold within sixty days of the subject property and was located on the same street. The Respondent made an adjustment of \$17,475 in the appraisal to reflect the fact that this house was almost 700 square feet bigger than the subject property.⁴²

24. The MLS information for Comparable Sale Number Four noted that the lot was owned by the buyer and the sale price reflected the house only.⁴³ This was not disclosed or analyzed in the appraisal report.⁴⁴ The Respondent acknowledged that this was an error, and indicated that an upward adjustment properly should have been made to that sale for the buyer-owned lot. Because the value of the subject property was not based on just one sale, it is likely that the error had little effect on the appraisal.⁴⁵

25. Based on MLS listings, the Department identified two split level homes in Kimball with unfinished basements that were active at the time of the November 2006 appraisal and were listed at that time for \$179,900 (463 Elm Street N.)⁴⁶ and \$169,900 (256 Publishers Drive N.E.).⁴⁷ Neither of these properties was discussed in the November 2006 appraisal or mentioned in the

⁴⁰ Ex. 7-5; Test. of Respondent.

⁴¹ Test. of Hack.

⁴² Exs. 7-5, 14.

⁴³ Ex. 14-1; Test. of Hack.

⁴⁴ Test. of Hack; see Ex. 7.

⁴⁵ Test. of Respondent.

⁴⁶ Ex. 10-1.

⁴⁷ Ex. 10-2; Test. of Hack. The initial listing for the property on Publishers Drive expired on December 3, 2006, before the home was sold. Ex. 10-2. The house was later sold on March 31, 2006, for \$154,550. Ex. 11-1.

Respondent's work file. However, these properties could not properly be used as comparable sales because they had not been sold as of the date of the appraisal.⁴⁸ In addition, the property located on Elm Street had a three-car garage unlike the subject property, and had been on the market for 282 days, well above the 109-day average in Brainerd and Kimball.⁴⁹

26. The Department also identified five split-entry homes that were sold in Kimball between February 24, 2006, and September 22, 2006, for prices of \$154,550 (256 Publishers Drive N.E.), \$163,500 (241 Chatter Circle N.E.),⁵⁰ \$156,600 (251 Newspaper Run N.E.),⁵¹ \$158,000 (261 Newspaper Run N.E.),⁵² and \$169,700 (210 Newspaper Run N.E.).⁵³ None of these properties were discussed in the November 2006 appraisal or mentioned in the Respondent's work file.

27. The Kimball properties identified by the Department appear to be similar to the newly-constructed subject property in certain respects, such as style of home (split entry), size, and location within the City of Kimball.⁵⁴ However, there also were some differences between the subject property and the properties proposed by the Department as comparables. For example, 256 Publishers Drive N.E. was built in 2005 and the MLS listing for the property indicated that two exclusions existed (without further explanation),⁵⁵ the property located at 241 Chatter Circle N.E. was built in 2005,⁵⁶ the property located at 251 Newspaper Run N.E. was built in 2004 and had a three-car garage;⁵⁷ the property located at 261 Newspaper Run N.E. was built in 2004, had been previously owned, and was on the market only 26 days, which could indicate a distressed sale,⁵⁸ and the property located at 210 Newspaper Run N.E. was built in 2005 and had a three-car garage.⁵⁹ In addition, neither of the active homes identified by the Department⁶⁰ and only one of the sold homes identified by the Department⁶¹ had a walk-out basement like the subject property.⁶² The Department investigator did not inspect or drive by any of the properties he alleged to be comparable, but merely found them on MLS. He also did not inspect or drive by the subject property.⁶³ The Department thus was unable to

⁴⁸ Test. of Hack; Test. of Respondent.

⁴⁹ Test. of Respondent. The Elm Street property was eventually sold on February 19, 2007, for \$177,000. Ex. 10-1.

⁵⁰ Ex. 11-2.

⁵¹ Ex. 11-3.

⁵² Ex. 11-4.

⁵³ Ex. 11-5.

⁵⁴ Test. of Hack.

⁵⁵ Ex. 11-1.

⁵⁶ Ex. 11-2.

⁵⁷ Ex. 11-3.

⁵⁸ Ex. 11-4.

⁵⁹ Ex. 11-5.

⁶⁰ See Exs. 10-1 and 10-2.

⁶¹ See Ex. 11-5.

⁶² Ex. 7-3, 7-4.

⁶³ Test. of Hack.

provide any evidence comparing the precise location or quality of construction of these homes to that of the subject property. Finally, the Respondent typically looks for sales that closed within the prior six months when examining comparables.⁶⁴ The sales of four of the Kimball properties identified by the Department closed more than six months prior to the appraisal performed by the Respondent.⁶⁵ The only property identified by the Department that closed within six months of the Respondent's appraisal was 261 Newspaper Run N.E., which closed on September 22, 2006.⁶⁶

28. At the request of the lender, the Respondent later prepared an Appraisal Update and/or Completion Report, an Operating Income Statement, and a Single Family Comparable Rent Schedule relating to 836 Poplar Drive. She issued those reports on February 21, 2007.⁶⁷ In the Replacement Reserve Schedule prepared by the Respondent as part of the Operating Income Statement, the Respondent uniformly estimated that the remaining life of several different appliances (the stove/range, refrigerator, dishwasher, air conditioning unit, washer and dryer, and furnace) was 25 years, which was not realistic or shown to be supported by any authoritative source. In addition, the Respondent did not take into consideration the need for eventual carpet replacement.⁶⁸

29. In the Single Family Comparable Rent Schedule issued by the Respondent on February 21, 2007, the Respondent estimated the monthly market rent of the subject property as of February 5, 2007, to be \$1,475, based upon three comparable rental properties located in Randall, Minnesota (150 Boulder Place, 148 Boulder Place, and 144 Boulder Place). The Respondent included the following comments:

Rental data is scarce in this market; appraiser researched local property management companies, newspapers [sic] and .com resources and could not locate rental data in the subject's immediate neighborhood. Builder provided all rental comps above, located in the same Greater Lakes Market Area with similar neighborhood characteristics and distances are not considered to be an adverse factor.⁶⁹

30. The Respondent indicated in the Schedule that the monthly rent for each of the three comparables was \$1,500. However, based upon the leases for these properties, the monthly rent for 150 Boulder Place was \$1,570;⁷⁰ the

⁶⁴ Test. of Respondent.

⁶⁵ 256 Publishers Drive N.E. closed on March 31, 2006, 241 Chatter Circle N.E. closed on April 14, 2006, 251 Newspaper Run N.E. closed on February 24, 2006, and 210 Newspaper Run N.E. closed on March 9, 2006. See Exs. 11-1 – 11-3, 11-5.

⁶⁶ Ex. 11-4.

⁶⁷ Ex. 7-17 – 7-24; Testimony of Respondent.

⁶⁸ Ex. 7-22; Test. of Hack.

⁶⁹ Ex. 7-23; Test. of Respondent.

⁷⁰ Ex. 13-2.

monthly rent for 148 Boulder Place was \$1,200;⁷¹ and the monthly rent for 144 Boulder Place was \$1,400.⁷² The Respondent thus did not accurately report the rental amounts in Single Family Comparable Rent Schedule and merely relied on information provided by the builder (who was a party to the transaction) without verification from a neutral source.

31. The work file provided by the Respondent to the Department pertaining to the November 2006 appraisal contained copies of MLS listings pertaining to the subject property and Comparable Sales Numbers 1-4 and 6; and three pages of handwritten notes relating to the date she inspected the subject property, identifying numbers for photographs she took of the property, and the property's lay-out, features, and materials. The listings pertaining to the comparables were printed on September 24, 2008.⁷³

32. The Respondent's work file did not contain the purchase agreement or county tax data. It did not include any information showing that the Respondent had researched and analyzed other potential comparables. In addition, the work file did not contain any information to show that research was conducted regarding the condition of the market and whether it was increasing, decreasing, or stable.⁷⁴

840 Poplar Drive, Kimball, Minnesota

33. The Respondent also issued a Uniform Residential Appraisal Report as of November 10, 2006, for a property located at 840 Poplar Drive in Kimball, Minnesota.⁷⁵ This property was similar to 836 Poplar Drive (the property discussed above) and in the same development, and the Respondent appraised both of these properties at the same time.⁷⁶

34. The appraisal report relating to 840 Poplar Drive was signed by the Respondent on November 27, 2006. This appraisal was also conducted for Mortgage & Investment Consultants and borrower Maurice Stay. The property was described as a split entry, 2-bedroom, 1-bath home situated on a .243-acre lot with an above-grade GLA of 972 square feet and a basement and finished below-grade area of 972 square feet. The subject property, like 836 Poplar Drive, had a walk-out basement. The home was built in 2006.⁷⁷ The appraisal indicates that the Respondent did not analyze the contract for sale because it was "not available."⁷⁸ Based upon a copy of an unsigned earlier appraisal report

⁷¹ Ex. 13-5.

⁷² Ex. 13-10.

⁷³ Ex. 9.

⁷⁴ Test. of Hack.

⁷⁵ Ex. 19-1 – 19-16. The Respondent issued the remainder of Ex. 19, consisting of the Appraisal Update, additional photographs, the Operating Income Statement, and the Single Family Comparable Rent Schedule, on March 18, 2007.

⁷⁶ Testimony of Respondent.

⁷⁷ Ex. 19-1 – 19-16; Testimony of Respondent.

⁷⁸ Ex. 19-3.

retained in the Respondent's files, it is likely that the Respondent had previously issued an appraisal of the same property as of October 27, 2006, for a different lender and buyer.⁷⁹ The Respondent did not disclose her prior appraisal of the property in her November 2006 appraisal.⁸⁰ In both appraisals, the Respondent concluded that the market value of the property was \$195,000.⁸¹

35. Although the Respondent's appraisal reflected the property's market value as of November 10, 2006, the lender did not fax the formal Request for Appraisal to the Respondent's office until November 16, 2006.⁸² However, the Respondent had previously received a telephone call from the lender in which she was told that the appraisal was needed. The Respondent did not provide her appraisal to the lender until after she signed it on November 27, 2006, well after the formal Request for Appraisal was received.⁸³

36. The Respondent used four comparable sales in connection with the November 2006 appraisal. Two of the comparable sales were located in Kimball, one was in St. Joseph (noted to be 17 miles north), and one was in Sauk Rapids (noted to be 19 miles north/northeast).⁸⁴ These comparables were the same as Comparable Sales 1 – 4 used in the Respondent's November 2006 appraisal of 836 Poplar Drive,⁸⁵ discussed above.

37. The appraisal included the following summary of the sales comparison approach:

The distance between the subject and the sales is common in this market, and is not an adverse factor due to the limited number of sales available. Sales of varying style have been utilized in the sales comparison analysis; a combination of split entry and multi level sales were used, as these sales are the best available to reflect the subject's GLA, room count and amenities.⁸⁶

38. As discussed above with respect to the similar property located at 836 Poplar Drive,⁸⁷ the Respondent mistakenly described Comparable Sale Number Two as a "multi-level" home when it was in fact a split entry, and failed to disclose and analyze the fact that the sale price for Comparable Sale Number Four reflected the house only. The Respondent acknowledged that this was an error, and indicated that an upward adjustment properly should have been made to that sale for the buyer-owned lot. Because the value of the subject property

⁷⁹ Ex. 17.

⁸⁰ Ex. 19; Test. of Hack.

⁸¹ Exs. 17, 19.

⁸² Ex. 21-1.

⁸³ Ex. 19-9; Test. of Respondent.

⁸⁴ Ex. 19-4 – 19-5.

⁸⁵ Ex. 7-4 – 7-5.

⁸⁶ Ex. 19-4.

⁸⁷ See Findings 20 and 24.

was not based on just one sale, it is likely that the error had little effect on the appraisal.⁸⁸

39. In addition, for the same reasons discussed above,⁸⁹ there were some differences between the subject property and the comparable sales selected by the Respondent. Specifically, two of the comparables (Comparable Sales Numbers Two and Three) were located in St. Joseph and Sauk Rapids rather than Kimball. In addition, one comparable (Comparable Sale Number Four) was a one-story home rather than a split entry and also was significantly larger than the subject property.⁹⁰

40. As discussed above,⁹¹ the Respondent used 888 Poplar Drive S.E. in Kimball as Comparable Sale Number Four in the appraisal because it sold within sixty days of the subject property and was located on the same street. The Respondent made an adjustment of \$17,475 in the appraisal to reflect the fact that this house was almost 700 square feet bigger than the subject property.⁹²

41. As discussed in Findings 25-27 above, based solely on MLS listings, the Department identified two properties in Kimball that were active listings at the time of the November 2006 appraisal and five split-entry homes that were sold in Kimball between February 24, 2006, and September 22, 2006. None of these properties were discussed in the November 2006 appraisal or mentioned in the Respondent's work file. The active listings could not properly be used as comparable sales because they had not been sold as of the date of the appraisal.⁹³ In addition, one of the active listings had a three-car garage and had been on the market for 282 days, well above the 109-day average in Brainerd and Kimball.⁹⁴ While the Kimball properties identified by the Department appear to be similar to the newly-constructed subject property in certain respects, such as style of home (split entry), size, and location within the City of Kimball,⁹⁵ there also were some differences between the subject property and the properties proposed by the Department as comparables. These differences were explained in detail in Finding 27 above, and the same analysis is equally applicable to 840 Poplar Drive.

42. At the request of the lender, the Respondent later prepared an Appraisal Update and/or Completion Report, an Operating Income Statement, and a Single Family Comparable Rent Schedule relating to 840 Poplar Drive.

⁸⁸ Test. of Respondent.

⁸⁹ See Finding 22.

⁹⁰ Test. of Hack.

⁹¹ See Finding 23.

⁹² Exs. 14, 19-5.

⁹³ Test. of Hack; Test. of Respondent.

⁹⁴ Test. of Respondent. The Elm Street property was eventually sold on February 19, 2007, for \$177,000. Ex. 10-1.

⁹⁵ Test. of Hack.

These reports were issued on March 18, 2007.⁹⁶ Because the subject property was under construction, the Appraisal Update and/or Completion Report was needed to certify that the home was complete and there had been no decline in market value.⁹⁷ In the Replacement Reserve Schedule prepared by the Respondent as part of the Operating Income Statement, the Respondent once again uniformly estimated that the remaining life of several different appliances (the stove/range, refrigerator, dishwasher, air conditioning unit, washer and dryer, and furnace) was 25 years, which was not realistic or shown to be supported by any authoritative source. In addition, the Respondent did not take into consideration the need for eventual carpet replacement.⁹⁸

43. In the Single Family Comparable Rent Schedule issued by the Respondent on March 18, 2007, the Respondent estimated the monthly market rent of the subject property as of February 5, 2007, to be \$1,475, based upon the same three comparable rental properties located in Randall, Minnesota that she had used in her updated appraisal of 836 Poplar (150 Boulder Place, 148 Boulder Place, and 144 Boulder Place).⁹⁹ The Respondent included the following comments:

Rental data is scarce in this market; appraiser researched local property management companies, newspapers [sic] and .com resources and could not locate rental data in the subject's immediate neighborhood. Builder provided all rental comps above, located in the same Greater Lakes Market Area with similar neighborhood characteristics and distances are not considered to be an adverse factor.¹⁰⁰

44. The Respondent indicated in the Schedule that the monthly rent for each of the three comparables was \$1,500.¹⁰¹ However, as noted in Finding 30 above, the leases for these properties reflect actual monthly rents of \$1,570, \$1,200, and \$1,400.¹⁰² The Respondent thus did not accurately report the rental amounts in the Schedule and merely relied on information provided by the builder (who was a party to the transaction) without verification from a neutral source.

45. The Respondent's work file relating to the October 27, 2006, appraisal of 840 Poplar Drive contained a copy of the Request for Appraisal; three pages of notes regarding the property and its layout, features, and materials; a copy of the MLS listing for the subject property; a copy of a County webpage relating to the property; and property tax records relating to the

⁹⁶ Ex. 19-17 – 19-23; Testimony of Respondent.

⁹⁷ Ex. 19-17 – 19-23; Testimony of Respondent.

⁹⁸ Ex. 19-22; Test. of Hack.

⁹⁹ Ex. 19-20.

¹⁰⁰ Ex. 19-20. These comments were identical to those contained in the updated appraisal of 836 Poplar. See Ex. 7-23.

¹⁰¹ Ex. 19-20.

¹⁰² Exs. 13-2, 13-5, and 13-10.

property.¹⁰³ The Respondent's work file relating to the November 10, 2006, appraisal contained a copy of the Request for Appraisal; a copy of the MLS listing for the subject property; and copies of the MLS listings for three of the four comparable sales used in the appraisal.¹⁰⁴

46. The Respondent's work file did not contain the purchase agreement, rental comparable information, and market research data regarding whether the market was increasing, decreasing, or stable.¹⁰⁵

150 Boulder Place, Randall, Minnesota

47. The Respondent issued a Uniform Residential Appraisal Report as of November 10, 2006, for 150 Boulder Place in Randall, Minnesota. The property was described as a split entry, 2-bedroom, 1-bath home situated on a .52-acre lot with an above-grade GLA of 1,040 square feet and another 1,040 square feet in the basement and finished below-grade rooms. This appraisal was also conducted for Mortgage & Investment Consultants and borrower Maurice Stay.¹⁰⁶ The appraisal indicates that the Respondent did analyze the contract for sale for the subject purchase transaction.¹⁰⁷ The Respondent had previously issued an appraisal of the same property as of October 24, 2006, for a different lender and buyer,¹⁰⁸ but did not disclose that fact in the November 10, 2006 appraisal.¹⁰⁹ The Respondent concluded in both appraisals that the market value of the property was \$195,000.¹¹⁰

48. Although the Respondent's appraisal reflected the property's market value as of November 10, 2006, and she issued the report that day, the lender did not fax the formal Request for Appraisal to the Respondent's office until November 16, 2006.¹¹¹ However, the Respondent had previously received a telephone call from the lender in which she was told that the appraisal was needed.¹¹²

49. Based upon photographs taken by the Respondent of 150 Boulder Place, it is apparent that the Respondent visited the property on at least two separate occasions, most likely in connection with the October and November appraisals.¹¹³ Under the circumstances, the mere fact that the Respondent may have used the same photograph of the house on the cover pages of her October

¹⁰³ Ex. 18.

¹⁰⁴ Ex. 20.

¹⁰⁵ Test. of Hack; see Exs. 18, 20.

¹⁰⁶ Ex. 24; Test. of Hack.

¹⁰⁷ Ex. 24-3.

¹⁰⁸ Ex. 22.

¹⁰⁹ Ex. 24; Test. of Hack.

¹¹⁰ Exs. 22, 24.

¹¹¹ Exs. 24-9, 25-1.

¹¹² Test. of Respondent.

¹¹³ Exs. 35-40; Test. of Respondent.

and November 2006 appraisals of the property¹¹⁴ does not warrant a conclusion that the Respondent failed to inspect the property for the appraisal she performed on November 10, 2006.

50. The Respondent used four comparable sales in connection with the November 2006 appraisal. Three of the comparable sales were located in Randall and one was located in Little Falls (5 miles south/southeast of the subject property).¹¹⁵

51. The appraisal included the following summary of the sales comparison approach:

All sales are less than six months old. Although the subject property and comparable sales are located in an area featuring increasing market values, no time adjustments have been taken, as it is difficult to make accurate time adjustments for the seasonal market in which we are located. Site adjustments taken are based on the overall value of each site with consideration given to total area, elevation, topography, vegetation and location. The distance between the subject and the sales is common in this market, and is not an adverse factor due to the limited number of sales available. Sales of varying style have been utilized in the sales comparison analysis; a combination of 1 story and split entry sales were used, as these sales are the best available to reflect the subject's GLA, room count and amenities.¹¹⁶

52. In selecting comparable sales, the Respondent generally looked for properties that were geographically close and reflected the size, bedroom count, and age of the subject property to the extent possible.¹¹⁷ Although Comparable Sale Number One was a one-story home and was 24 years older than the subject property, it was located in Randall only half a mile away from 150 Boulder Place. It was similar in square footage, lot size, and above-grade rooms, and was sold only 3½ months before the date of the Respondent's appraisal. The Respondent made an adjustment for the age of the home in her appraisal.¹¹⁸ Comparable Sale Number Two was a split entry in Randall, like the subject property, and had similar square footage and above-grade rooms. Although the sale of Comparable Sale Number Two did not close until December 8, 2006, the Respondent clearly noted this in the appraisal.¹¹⁹ Comparable Sale Number Three was located in another city (Little Falls), was situated on a much larger lot (2.5 acres), and had considerably more square footage (1,352) than the subject property. However, it was within a five-mile radius, reflected the split entry style

¹¹⁴ Compare Exs. 22 and 24.

¹¹⁵ Ex. 24-4 – 24-5.

¹¹⁶ Ex. 24-4.

¹¹⁷ Test. of Respondent.

¹¹⁸ Ex. 24-4; Test. of Respondent.

¹¹⁹ *Id.*

of the subject property, and was a newer home with a similar bedroom count. The Respondent made a downward adjustment due to the larger lot size and larger square footage.¹²⁰ Comparable Sale Number Four was a larger, two-story home, but was located in Randall within 1/10 of a mile of the subject property and sold just 3½ months before the date of the Respondent's appraisal. Again, the Respondent made a downward adjustment for the larger GLA of this property.¹²¹ The Department did not provide any evidence of other, more comparable sales.

53. The Respondent's November 2006 appraisal included an Operating Income Statement and a Single Family Comparable Rent Schedule.¹²² In the portion of the Operating Income Statement relating to projected expenses during the next twelve months, the Respondent did not include any estimate of costs associated with interior paint/decorating, general repairs/maintenance, or supplies.¹²³ In the Replacement Reserve Schedule prepared by the Respondent as part of the Operating Income Statement, the Respondent once again uniformly estimated that the remaining life of several different appliances (the stove/range, refrigerator, dishwasher, air conditioning unit, washer and dryer, and furnace) was 25 years, which was not realistic or shown to be supported by any authoritative source. In addition, the Respondent did not take into consideration the need for eventual carpet replacement.¹²⁴

54. In the Single Family Comparable Rent Schedule, the Respondent estimated the monthly market rent of the subject property as of November 10, 2006, to be \$950. She used three properties as comparable rental properties. One was located in Pine River (28 miles north), one in Baxter (2.5 miles north), and one in Breezy Point (19 miles north). The Respondent included the following comments:

Rental comps #1 and #3 are located furthest from the subject. Rental data is scarce in this market; all rental comps provided are from the same Greater Lakes Market Area and distances are not considered to be an adverse factor.¹²⁵

55. The Respondent's work file relating to the November 10, 2006 appraisal of 150 Boulder Place contained a copy of the Appraisal Request (which was faxed on November 16, 2006). Although the file also contained copies of the MLS listings for three of the four comparable sales used in the appraisal, the copies were not printed until September 24, 2008.¹²⁶ The work file does not contain the purchase agreement, county tax data, rental comparable information,

¹²⁰ *Id.*

¹²¹ Ex. 24-5; Test. of Respondent.

¹²² Exs. 24-18 – 24-20.

¹²³ Ex. 24-18; Test. of Hack.

¹²⁴ Ex. 24--19; Test. of Hack.

¹²⁵ Ex. 24-20.

¹²⁶ Ex. 25.

or market research data regarding whether the market was increasing, decreasing, or stable.¹²⁷

144 Boulder Place, Randall, Minnesota

56. The Respondent issued a Uniform Residential Appraisal Report as of November 10, 2006, for 144 Boulder Place in Randall, Minnesota. The property was described as a split entry, 2-bedroom, 1-bath home situated on a .24-acre lot with a GLA of 1,040 square feet and a below-grade area of another 1,040 square feet. This appraisal was also conducted for Mortgage & Investment Consultants and borrower Maurice Stay.¹²⁸ The appraisal indicates that the Respondent did analyze the contract for sale for the subject purchase transaction.¹²⁹ The Respondent had previously issued an appraisal of the same property as of September 16, 2006, for a different buyer and lender,¹³⁰ but did not disclose that fact in the November 10, 2006 appraisal.¹³¹ The Respondent concluded in both appraisals that the market value of the property was \$195,000.¹³²

57. Although the Respondent's appraisal reflected the property's market value as of November 10, 2006, and she issued the report that day, the lender did not fax the formal Request for Appraisal to the Respondent's office until November 16, 2006.¹³³ However, the Respondent had previously received a telephone call from the lender in which she was told that the appraisal was needed and exchanged some other calls with the lender regarding whether the written request had been received.¹³⁴

58. The Respondent noted in both the September 2006 and the November 2006 appraisals that the subject property had a 3-car garage and a paved driveway.¹³⁵ However, based on the floor plan included in the appraisals, the handwritten notes in the work file, and the photographs of the subject property, it is evident that the property had only a two-car garage and did not have a paved driveway.¹³⁶ With this correction, it appears that 150 Boulder Place and 144 Boulder Place were on different sized lots but otherwise were very similar in style, square footage, above-grade rooms, and age.

¹²⁷ Test. of Hack; see Ex. 25.

¹²⁸ Ex. 29; Test. of Hack. Based upon the photographs and descriptions of the property, it was virtually identical to 150 Boulder Place (discussed above).

¹²⁹ Ex. 29-3.

¹³⁰ Ex. 27.

¹³¹ Ex. 29; Test. of Hack.

¹³² Exs. 27, 29.

¹³³ Exs. 28-1, 29-9.

¹³⁴ Test. of Respondent.

¹³⁵ Exs. 27-3, 29-3.

¹³⁶ Exs. 27-3, 27-11, 28-4, 29-1, 29-3, 29-11; Test. of Hack.

59. The Respondent certified as part of her September 2006 and November 2006 appraisals that she had conducted inspections of the subject property, and there is no convincing evidence to the contrary.¹³⁷

60. The Respondent used the same four comparable sales (three located in Randall and one located in Little Falls) in connection with her November 2006 appraisal of 144 Boulder as she used in her November 2006 appraisal of 150 Boulder (discussed in the preceding section of these Findings).¹³⁸ She also included the same summary of the sales comparison approach:

All sales are less than six months old. Although the subject property and comparable sales are located in an area featuring increasing market values, no time adjustments have been taken, as it is difficult to make accurate time adjustments for the seasonal market in which we are located. Site adjustments taken are based on the overall value of each site with consideration given to total area, elevation, topography, vegetation and location. The distance between the subject and the sales is common in this market, and is not an adverse factor due to the limited number of sales available. Sales of varying style have been utilized in the sales comparison analysis; a combination of 1 story and split entry sales were used, as these sales are the best available to reflect the subject's GLA, room count and amenities.¹³⁹

61. The comparable sales used by the Respondent differed from the subject property in certain respects and were similar to the subject property in other respects, for the same reasons set forth in Finding 52 above. The Department did not provide any evidence of other, more comparable sales.

62. The Respondent's November 2006 appraisal of 144 Boulder Place included an Operating Income Statement and a Single Family Comparable Rent Schedule.¹⁴⁰ In the portion of the Operating Income Statement relating to the expense projection for the next 12 months, the Respondent did not include any estimate of costs associated with interior paint/decorating, general repairs/maintenance, or supplies.¹⁴¹ In the Replacement Reserve Schedule prepared by the Respondent as part of the Operating Income Statement, the Respondent again uniformly estimated that the remaining life of several different

¹³⁷ Exs. 27 and 29; Test. of Respondent.

¹³⁸ Ex. 29-4 – 29-5. Apart from Comparable Sale Number Two, the Respondent also used the same comparables in her September 2006 appraisal. At the time the November 2006 appraisal was performed, the lender asked her to replace one of the comparables she had used earlier (6153 Ottetail Court, Baxter). In the November 2006 appraisal, the Respondent instead used 148 Boulder Drive in Randall. Testimony of Respondent; Exs. 27-4, 29-4.

¹³⁹ Ex. 29-4.

¹⁴⁰ Ex. 29-17 – 29-19; Ex. 30.

¹⁴¹ Ex. 29-17; Test. of Hack.

appliances (the stove/range, refrigerator, dishwasher, air conditioning unit, washer and dryer, and furnace) was 25 years, and did not take into consideration the need for eventual carpet replacement, which was not realistic or shown to be supported by any authoritative source.¹⁴²

63. In the Single Family Comparable Rent Schedule, the Respondent estimated the monthly market rent of the subject property as of November 10, 2006, to be \$950. She used as comparable rental properties the same three properties located in Pine River, Baxter, and Breezy Point that she had used in her November 10 appraisal of 150 Boulder Place (discussed above) and once again included the following comments:

Rental comps #1 and #3 are located furthest from the subject. Rental data is scarce in this market; all rental comps provided are from the same Greater Lakes Market Area and distances are not considered to be an adverse factor.¹⁴³

64. The Respondent's work file relating to the September and November 2006 appraisals of 144 Boulder Place contains a copy of the Appraisal Request (which was faxed on November 16, 2006) and four pages of handwritten notes regarding the lay-out, materials, and features of the subject property.¹⁴⁴ The work file does not contain the purchase agreement, county tax data, information regarding rental and sale comparables, or market research data regarding whether the market was increasing, decreasing, or stable.¹⁴⁵ Accordingly, the Respondent failed to maintain a complete work file containing supporting data for the appraiser's opinions and conclusions.¹⁴⁶

Additional Findings

65. The Respondent has no affiliation with any of the lenders involved in the appraisals discussed above and did not receive any payment from them other than her fee for conducting the appraisal. She was never asked to arrive at a particular value in her appraisals, and never agreed to do so.¹⁴⁷

66. The Respondent was not aware that prior appraisals she performed on a property should be disclosed in a later appraisal.¹⁴⁸ She also told the

¹⁴² Ex. 29-18; Test. of Hack.

¹⁴³ Ex. 29-19.

¹⁴⁴ Ex. 28.

¹⁴⁵ As noted above, the Respondent's work file relating to the November 10, 2006 appraisal of 150 Boulder Place (Ex. 25) contained a copy of the MLS listings for three of the four comparable sales that she used in her appraisals of both 150 Boulder and 144 Boulder Place. However, the MLS information was not printed until September 24, 2008.

¹⁴⁶ Test. of Hack; see Ex. 28.

¹⁴⁷ Test. of Respondent.

¹⁴⁸ Test. of Respondent; Test. of Hack.

Department investigator that she was not aware that an appraisal should note the need to install a driveway.¹⁴⁹

67. The property located at 9161 Atwater Court in Brainerd later went through foreclosure and was sold at a sheriff's sale. The properties located at 836 Poplar Drive and 840 Poplar Drive in Kimball also went through foreclosure. They were listed on MLS and each resold for approximately \$110,000. The property located at 150 Boulder Place in Randall went through foreclosure and a sheriff's sale, and the lender ultimately purchased the property back. Finally, the property located at 144 Boulder Place in Randall went through foreclosure and was sold as a "comp sold" (i.e., not through MLS) for approximately \$108,000. The Department does not contend that the Respondent's prior appraisals of those properties caused them to go into foreclosure or had any particular effect in that regard.¹⁵⁰

68. There is no evidence that the Respondent intentionally made any of the errors contained in the appraisals at issue in this case.

69. The Department's investigator did not perform a review appraisal of any of the Respondent's appraisals set forth above, and cannot assess whether the appraisals were accurately reported or reached a reliable result. He cannot say whether or not the dollar amounts of the Respondent's appraisals were correct or incorrect. In addition, the Department did not analyze and does not contend that the prior appraisals performed by the Respondent affected the market value she reached in the second appraisals.¹⁵¹

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Commerce are authorized to consider the charges against Respondent under Minn. Stat. §§ 45.027, subd. 7, 82B.07, and 14.50 (2004).

2. The Respondent received due, proper and timely notice of the charges against her, and of the time and place of the hearing. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant procedural requirements.

4. The Department has the burden to prove by a preponderance of the evidence that the Respondent violated applicable statutes,

¹⁴⁹ Test. of Hack.

¹⁵⁰ Test. of Hack.

¹⁵¹ Test. of Hack.

rules and uniform standards as alleged in its Notice of and Order for Hearing, Order to Show Cause, and Statement of Charges.¹⁵²

5. The Commissioner may deny, revoke, or suspend the license of a real estate appraiser if the licensee has violated any law, rule, or order related to the duties and responsibilities entrusted to the Commissioner, or has engaged in an act or practice which demonstrates that the licensee is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the Commissioner.¹⁵³

6. The license of a licensed real estate appraiser may be denied, revoked, suspended, or otherwise disciplined if the licensee “fails or refuses without good cause to exercise reasonable diligence in developing an appraisal, preparing an appraisal report, or in communicating an appraisal” or “engages in negligence or incompetence in developing an appraisal, in preparing an appraisal report, or in communicating an appraisal.”¹⁵⁴

7. The Department’s rules require that an appraiser must prepare and include in the final appraisal report a written disclosure of “any appraisal on the same property made by the appraiser in the last three years.”¹⁵⁵

8. Pursuant to the Department’s rules, a licensed real estate appraiser must not knowingly engage in any of the following unacceptable appraisal practices:

- (1) include inaccurate or misleading factual data about the subject neighborhood, site, improvements, or comparable sales;
- (2) fail to comment on negative factors with respect to the subject neighborhood, subject property, or proximity of the subject property to adverse influences;
- (3) unless otherwise disclosed in the appraisal report, use comparables in the valuation process that the appraiser has not at least personally inspected from the exterior by driving by them;
- (4) select and use inappropriate comparable sales or fail to use comparables that are physically and by location the most similar to the subject property;
- (5) use data, particularly comparable sales data, that was provided by parties who have a financial interest in the sale or financing of the subject property without the appraiser's verification

¹⁵² Minn. R. 1400.7300, subp. 5.

¹⁵³ Minn. Stat. § 45.027, subd. 7(a)(2) and (4).

¹⁵⁴ Minn. Stat. § 82B.20, subd. 2(6) and (7).

¹⁵⁵ Minn. R. 2808.6000, subp. 2(J).

of the information from a disinterested source. For example, it would be inappropriate for an appraiser to use comparable sales provided by the real estate broker who is handling the sale of the subject property, unless the appraiser verifies the accuracy of the data provided through another source and makes an independent investigation to determine that the comparables provided were the best ones available¹⁵⁶

9. Under the rules adopted by the Department, a licensed real estate appraiser must act in accordance with both applicable statutes and the Uniform Standards of Professional Appraisal Practice (USPAP) adopted by the Appraisal Standards Board of The Appraisal Foundation.¹⁵⁷

10. Under the USPAP Ethics Rule - Conduct, an appraiser must perform appraisals "ethically and competently, in accordance with USPAP and any supplemental standards agreed to by the appraiser in accepting the assignment." That rule also requires that an appraiser "must not communicate assignment results in a misleading or fraudulent manner."¹⁵⁸

11. Under the USPAP Ethics Rule - Record Keeping, an appraiser must prepare a work file for each appraisal that includes the name of the client, the identity of other intended users, true copies of any written reports, summaries of any oral reports or testimony, and "all other data, information, and documentation necessary to support the appraiser's opinions and conclusions and to show compliance with this Rule and all other applicable Standards, or references to the location(s) of such other documentation." An appraiser must retain the work file for a period of at least five years after preparation or at least two years after final disposition of any judicial proceeding in which the appraiser provided testimony relating to the assignment, whichever period expires last.¹⁵⁹

12. Under the USPAP Competency Rule, before accepting an assignment, an appraiser must properly identify the problem to be addressed and have the knowledge and experience to complete the assignment competently; or, in the alternative, the appraiser must disclose the lack of knowledge and/or experience to the client before accepting the assignment, take all steps necessary or appropriate to complete the assignment competently, and describe in the report the lack of knowledge and/or experience and the steps taken to complete the assignment competently. The comment to the rule indicates that competency "applies to factors such as, but not limited to, an appraiser's familiarity with a specific type of property, a market, a geographic area, or an analytical method." The rule goes on to state that, "[i]f such a factor is necessary for an appraiser to develop credible assignment results, the appraiser is

¹⁵⁶ Minn. R. 2808.6000, subp. 3A(1) – (5).

¹⁵⁷ Minn. R. 2808.6000, subp. 1, and Minn. Stat. § 82B.02, subd. 12.

¹⁵⁸ Excerpt from USPAP 2006 Edition at 7 (attached to Department's initial post-hearing submission).

¹⁵⁹ *Id.* at 9.

responsible for having the competency to address that factor or for following the steps outlined above"160

13. The USPAP Supplemental Standards Rule states that the USPAP provides the common basis for all appraisal practice, but acknowledges that supplemental standards applicable to appraisals prepared for specific purposes or property types may be issued by other agencies. The rule specifies that an appraiser and client must ascertain whether any published supplemental standards in addition to USPAP apply to the assignment being considered.¹⁶¹

14. USPAP Supplemental Standards Rule 1-1(a) states that, in developing a real property appraisal, an appraiser must "be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal." Rule 1-1 (c) specifies that an appraiser must not "render appraisal services in a careless or negligent manner, such as by making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate affects the credibility of those results."¹⁶²

15. USPAP Standards Rule 1-4 requires that an appraiser collect, verify, and analyze all information necessary for credible assignment results in developing a real property appraisal. In addition, USPAP Standards Rule 1-4(a) states that, "[w]hen a sales comparison approach is necessary for credible assignment results, an appraiser must analyze such comparable sales data as are available to indicate a value conclusion."¹⁶³

16. USPAP Standards Rule 1-5 (a) requires that, "[w]hen the value opinion to be developed is market value, an appraiser must, if such information is available to the appraiser in the normal course of business: . . . analyze all agreements of sale, options, and listings of the subject property current as of the effective date of the appraisal"164

17. USPAP Standards Rule 2-2(b)(viii) specifies that the content of a Summary Appraisal Report must be consistent with the intended use of the appraisal and, at a minimum, "summarize the information analyzed, the appraisal methods and techniques employed, and the reasoning that supports the analyses, opinions, and conclusions; exclusion of the sales comparison approach, cost approach, or income approach must be explained. . . ."165

¹⁶⁰ *Id.* at 11.

¹⁶¹ *Id.* at 16.

¹⁶² *Id.* at 17.

¹⁶³ *Id.* at 20.

¹⁶⁴ *Id.* at 21.

¹⁶⁵ *Id.* at 28.

18. USPAP Standards Rule 2-3 requires that each written real property appraisal report must contain a signed certification that is similar in content to a form prescribed in the rules.¹⁶⁶

19. The USPAP Supplemental Standards Rule – Fannie Mae Selling Guide states that appraisers are expected to analyze and report on the current contract for sale in their appraisal report.¹⁶⁷ In addition, in selecting comparable sales, appraisers are required to “research, analyze, and consider influences that may affect value based on market evidence (such as closed sales, contract sales, and properties for sale in the market area; market studies; etc.).”¹⁶⁸ The standard goes on to state:

If the property is located in an area in which there is a shortage of truly comparable sales--either because the nature of the property improvements or the relatively low number of sales transactions in the neighborhood--the appraiser might need to use as comparable sales properties that are not truly comparable to the subject property or properties that are located in competing neighborhoods. In some situations, sales of properties that are not truly comparable or sales of properties that are located in competing neighborhoods may simply be the best comparables available and the most appropriate for the appraiser's analysis. The use of such comparables is acceptable as long as the appraiser adequately documents his or her analysis and explains why these comparable sales were used (including a discussion of how a competing neighborhood is comparable to the subject neighborhood).¹⁶⁹

20. The USPAP Supplemental Standards Rule – Fannie Mae Selling Guide further states that exhibits for appraisal reports based on interior and exterior property inspections must include “[c]lear descriptive photographs (either in black and white or color) that show the front of each comparable sale and that are appropriately identified.” The Guide indicates that photographs generally should be originals that are produced by photography or electronic imaging, but notes that “copies of photographs from a multiple listing service or from the appraiser’s files are acceptable if they are clear and descriptive.” However, the Guide indicates that photographs of comparable rentals and listings are not required.¹⁷⁰

¹⁶⁶ *Id.* at 30.

¹⁶⁷ Fannie Mae Single Family (308761), 2006 Selling Guide, Part XI: Property and Appraisal Guidelines; XI, Chapter 4: Reviewing the Appraisal Report (11/08/04) (attached to the Department’s initial post-hearing submission).

¹⁶⁸ *Id.* at Part XI, 406: Sales Comparison Approach to Value; XI, 406.02: Selection of Comparable Sales (06/30/02) (attached to Department’s initial post-hearing submission).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at Part XI, 204.01: Appraisals Based on Interior and Exterior Property Inspections (11/01/05) (attached to Department’s initial post-hearing submission).

21. The USPAP Supplemental Standards Rule – Fannie Mae Selling Guide lists the following examples of appraisal practices that are considered unacceptable:

- Misrepresentation of the physical characteristics of the subject property, improvements, or comparable sales;
- Failure to comment on negative factors with respect to the subject neighborhood, subject property, or proximity of the subject property to adverse influences;
- Failure to adequately analyze and report any current contract of sale, option, offering, or listing of the subject property and the prior sales of the subject property and the comparable sales; . . .
- Use of comparable sales in the valuation process even though the appraiser has not personally inspected the exterior of the comparable properties by, at least, driving by them; . . .
- Use of data--particularly comparable sales data--that was provided by parties who have a financial interest in the sale or financing of the subject property without the appraiser's verification of the information from a disinterested source (For example, it would be inappropriate for an appraiser to use comparable sales provided by the real estate broker who is handling the sale of the subject property, unless the appraiser verifies the accuracy of the data provided with another source and makes an independent investigation to determine that the comparable sales provided were the best ones available.)

22. The Department demonstrated by a preponderance of the evidence that the Respondent made the following errors in connection with the residential real estate appraisals at issue in this matter:

- failed to disclose that she had previously appraised the same property within the past three years in appraisal reports she prepared for 9161 Atwater Court, Brainerd, Minnesota; 840 Poplar Drive, Kimball, Minnesota; 150 Boulder Place, Randall, Minnesota, and 144 Boulder Place, Randall, Minnesota, in violation of Minn. R. 2808.6000, subp. 2(J). The Department failed to demonstrate that the Respondent had conducted an appraisal of 836 Poplar Drive, Kimball, Minnesota, prior to November of 2006.
- failed to analyze and report on the current agreement for sale with respect to 9161 Atwater Court, Brainerd, Minnesota, and 840 Poplar Drive, Kimball, Minnesota, without showing that the agreement was not available in the normal course of business, in

violation of USPAP SR 1-5(a), USPAP Supplemental Standards Rule – Fannie Mae, and Minn. R. 2808.6000, subp. 1.

- failed to maintain work file data necessary to support her opinions and conclusions in connection with her appraisals of the five properties involved in this case, in violation of USPAP Ethics Rule – Recordkeeping and Minn. R. 2808.6000, subp. 1.
- failed to comment on negative factors with respect to a subject property by failing to note that the driveways had not yet been completed in her appraisals of 9161 Atwater Court, Brainerd, Minnesota, and 144 Boulder Place, Randall, Minnesota, and thereby violated USPAP Supplemental Standards Rule – Fannie Mae, and Minn. R. 2808.6000, subp. 3A(2).
- used rental data provided by a party who had a financial interest in the transaction without verifying the accuracy of that information with a disinterested source, and thereby made errors in reporting rental amounts for comparable homes in connection with Single Family Comparable Rent Schedules she prepared after she completed appraisals for 836 and 840 Poplar Drive, Kimball, Minnesota, in violation of USPAP Supplemental Standards Rule – Fannie Mae, and Minn. R. 2808.6000, subp. 3A(5).
- included inaccurate information in her appraisals of the five properties at issue here, including inaccurate projections of expenses and replacement costs, in violation of Minn. R. 2808.6000, subp. 3A(1).
- failed to analyze and report the fact that the sale price of a comparable reflected only the house and not the lot in connection with her appraisal of 836 Poplar Drive and 840 Poplar Drive, in violation of USPAP Supplemental Standards Rule – Fannie Mae; and
- acted negligently and failed to exercise reasonable diligence in developing, preparing, or communicating appraisals, in violation of Minn. Stat. § 82B.20, subd. 2(6) and (7).

23. The Department failed to demonstrate by a preponderance of the evidence that the Respondent failed to inspect properties that were the subject of her appraisals; failed to at least drive by comparable sales; inappropriately used data that did not exist as of the appraised date; improperly used MLS photographs of comparable sales; failed to analyze physical and location differences between the subject property and comparables; failed to research and analyze active comparables; or selected and used comparable

sales that were inappropriate or not physically or by location the most similar to a subject property.

16. An Order imposing discipline is in the public interest.

17. These Conclusions are reached for the reasons discussed in the attached Memorandum, which is incorporated by reference in these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner of Commerce impose appropriate discipline against the Respondent's Real Estate Appraiser license.

Dated: July 23, 2010.

s/Barbara L. Neilson

BARBARA L. NEILSON

Administrative Law Judge

Reported: Digitally recorded; no transcript prepared.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after reviewing the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner's decision shall not be made until this Report has been available to the parties to the proceeding for at least ten (10) days.¹⁷¹ An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Emmanuel Munson-Regala, Deputy Commissioner, Minnesota Department of Commerce, 85 Seventh Place East, Suite 500, St. Paul, MN 55101 to ascertain the procedure for filing exceptions or presenting argument to the Commissioner.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2004). The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must

¹⁷¹ Unless otherwise noted, all references to Minnesota Statutes are to the 2004 edition and all references to Minnesota Rules are to the 2005 edition.

notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Department bears the burden in this case to prove its allegations by a preponderance of the evidence. The Minnesota Supreme Court has observed that while the proper standard of proof in professional licensing matters is a preponderance of the evidence, the agency's decision must be supported by evidence with "heft" or significance:

Even so these proceedings brought on behalf of the state, attacking a person's professional and personal reputation and character and seeking to impose disciplinary sanctions, are no ordinary proceedings. We trust that in all professional disciplinary matters, the finder of fact, bearing in mind the gravity of the decision to be made, will be persuaded only by evidence with heft.¹⁷²

As detailed in the Findings set forth above, it is evident that the Respondent made a number of errors in the appraisals at issue in this proceeding. She did not disclose prior appraisals she had performed of four of the five properties and admitted that she was unaware of any requirement to do so. She erroneously indicated that one of the subject properties (144 Boulder Place) had a three-car garage. She failed to maintain complete work files containing supporting data for the opinions and conclusions reached in her reports. She did not obtain a copy of the purchase agreement on a few occasions, and provided no evidence that she had made attempts to obtain a copy.

In two of the five appraisals, she erroneously identified one of the comparable sales as a "multi-level" home when in fact it was a split-entry home like the subject properties, and she failed to disclose that the sale price for another comparable sale reflected the house only because the lot was owned by the buyer. In preparing Operating Income Statements for four of the properties, she did not take into consideration the need for eventual carpet replacement. She also uniformly estimated that the remaining life of several different appliances was 25 years without providing any testimony or documentation supporting this claim. In addition, in preparing Single Family Comparable Rent Schedules after her appraisals for two of these properties, she did not accurately report the rental amounts of other comparables and merely relied on information

¹⁷² *In re Wang*, 441 N.W.2d 489, 493-94 (Minn. 1989).

provided by the builder (who was a party to the transaction) without verification from a neutral source.

After a careful review of the record, the Administrative Law Judge is not convinced that the Department has provided evidence with sufficient “heft” to support its allegations that the Respondent committed certain other misconduct. For example, despite the Respondent’s certification that she “performed a complete visual inspection of the interior and exterior areas of the subject property,”¹⁷³ the Department’s investigator testified that he believed that the photograph used in the November 10, 2006, appraisal of 840 Poplar Drive was the same one used in her October 27, 2006, appraisal, and concluded from this that the Respondent failed to inspect the property for the November 2006 appraisal. But the Department did not offer a copy of the photograph used in the October 2006 appraisal into evidence. And, even if the Respondent did use the same photograph in both appraisal reports, that would not necessarily mean that she failed to conduct an inspection for the second appraisal. The Department also alleged that the Respondent failed to inspect 150 Boulder Place in November 2006 based upon its view that the pictures used in the October and November 2006 appraisals of 150 Boulder Place were identical. Once again, the mere fact that the Respondent may have used the same photograph on both appraisals would not warrant jumping to the conclusion that she failed to inspect the property prior to the November 2006 appraisal. In any event, the Respondent provided numerous photographs she had taken of 150 Boulder Place that make it clear that she did visit the property on at least two separate occasions.

Similarly, the Department contended that the Respondent failed to at least drive by comparable sales based merely on the fact that she used photographs from the MLS listings for these comparables. The Respondent explained that she preferred to use MLS photographs because, in her opinion, MLS photographs are most reflective of the condition of those properties when they sold. Moreover, the USPAP Supplemental Standards Rule – Fannie Mae permits the use of copies from MLS or the appraiser’s files if they are “clear and descriptive.”

To support its allegation that the Respondent selected and used comparable sales that were not physically or by location the most similar to the Poplar Drive properties she appraised, the Department merely produced MLS listings showing that five split-entry homes located in Kimball had sold between February 24, 2006, and September 22, 2006. While those properties appeared to be similar to the subject properties in style, size, and location within the City of Kimball, there were also some differences between the subject properties and those proposed by the Department as comparables. These differences are discussed in the Findings. The Respondent provided some explanation in her appraisal report and in her testimony of the comparables she selected, and

¹⁷³ Ex. 19-8.

stressed that they all sold within six months of the appraisal. The sales of four of five properties identified by the Department closed more than six months prior to the Respondent's appraisal. In addition, because the Department's investigator did not inspect or drive by any of the properties he alleged to be comparable, there was no evidence comparing the precise location or quality of construction of those homes to that of the subject property. The Department's evidence lacks sufficient weight to warrant a conclusion that the comparables selected by the Respondent were inappropriate.

The Department's evidence supporting its allegation that the Respondent selected and used comparable sales that were not physically or by location the most similar to the Boulder Place properties she appraised was even more limited. The Department did not provide any MLS listings or other information to show that other, more comparable, sales or rentals existed in Randall during the relevant time period, but simply alleged that the Respondent failed to analyze and explain the use of competing floor plans and competing communities for comparable sales and rentals. The Respondent provided some explanation in her appraisal report of the reasons for her selection of these comparables, and also addressed that in her testimony at the hearing. While the explanations in her written appraisals could have been more detailed and explicit, the Department has not shown that the comparables she selected were inappropriate.

The errors found to have been made by the Respondent violated various statutes, rules and USPAP standards. But there is no evidence to suggest that the errors were made intentionally or for personal gain. Also, there have been no other complaints or disciplinary issues involving the Respondent during the thirteen years she has been licensed. Because it appears that the Respondent was careless in performing these appraisals and perhaps also lacks proper training, some form of discipline is warranted. In light of the nature of the errors and the Respondent's unblemished past performance, license revocation would appear to be excessive, especially since there is no allegation of fraud. Under the circumstances, the Administrative Law Judge recommends that the Commissioner consider either suspending or making the Respondent's license conditional for a period of time and requiring that the Respondent receive significant training on USPAP standards. In particular, it would appear that the Respondent would benefit from additional training regarding the need to set forth additional analysis in her written reports as well as the need to develop and maintain work files that support her findings, opinions, and market research. Of course, the Commissioner may determine that other forms of discipline are more appropriate.

B. L. N.